

Case 1744: CISG 8; 14; 18(1); 19; 19(3); 71⁴

United States: District Court for the Western District of Pennsylvania

Roser Technologies, Inc. v. Carl Schreiber GmbH

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Original in English

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Abstract prepared by Matthew VanDyke and Harry M. Flechtner, National Correspondent

A buyer located in the United States and a seller located in Germany entered into two supply contracts for the manufacture and sale of copper mold plates. After entering into the contracts, the seller notified the buyer that the seller's credit insurance coverage for buyer's payment had been cut, and insisted that the buyer secure a letter of credit or expedite payment. The buyer sued the seller in U.S. federal district (trial) court for breach of contract. The seller filed a counterclaim, alleging that the buyer repudiated the contract.

One issue before the court was whether the seller's terms and conditions had been incorporated into the parties' contracts. To decide the issue, commonly referred to as "a battle of the forms," the court analyzed the document exchanges that gave rise to the formation of the contracts. For both contracts, the seller sent the buyer a price quotation that referenced the seller's standard terms and the web address at which those terms could be found; the price quotations included the following language: "According to our standard conditions of sale to be found under www.csnmetals.de, we have pleasure in quoting without engagement as follows."

The buyer responded by sending the seller a purchase order per the price quotation; in response the seller sent the buyer an order confirmation. The order confirmations included the following language: "We thank you for your purchase order. This order confirmation is subject to our standard conditions of sale as known www.csnmetals.de." The seller's standard conditions of sale provided, among other things, that "[s]upplies and benefits shall exclusively be governed by German law. The application of laws on international sales of moveable objects and on international purchase contracts on moveable objects are excluded." The seller's documents also included the following language: "If we have offered a payment target, a sufficient coverage by our credit insurance company is assumed. In case this cannot be obtained we have to ask for equivalent guarantees or payment in advance."

The seller argued that the buyer's purchase orders were offers and the seller's order confirmations were rejections and counteroffers. The seller also argued that if the court deemed its order confirmations as acceptances to the buyer's offer, then the purchase order (the offers) included the seller's standard conditions via reference to the seller's price quotations. In contrast, the buyer argued that its purchase orders were offers that did not include the seller's standard conditions by reference, and that the seller's order confirmations were acceptances of the buyer's offers.

To resolve the dispute, the court first undertook a choice-of-law analysis to determine whether there was a conflict between the (United States) UCC and CISG. The court found that under UCC § 2-207, standard conditions are incorporated by reference into a contract if they do not result in surprise or hardship to the party against whom enforcement is sought. In contrast, the court found that Article 19 CISG generally adopts the "mirror image rule," under which the terms of the contract are those embodied in the last offer. Thus, under Article 19 CISG, an acceptance with material different standard conditions is not an acceptance, but rather a rejection and counteroffer. Furthermore, the court found that under Articles 8 and 14 CISG, standard conditions referenced by a party are incorporated into the contract only if the other party had reasonable notice of the attempted incorporation. The court thus found that there was a conflict between the CISG and the UCC. The court noted that the seller attempted to derogate from the CISG pursuant to Article 6 by including language in its standard terms providing that the transaction was governed by "German law" and stating that "application of laws on international sales of moveable objects and on international purchase contracts on moveable objects are excluded." The court held, however, that the attempted derogation was ineffective because the seller did not explicitly mention the CISG and neither party had argued to the court that German municipal law governed the transactions. Because the States of both the buyer and the seller were signatories to the CISG, the court held that the Convention governed the agreements.

⁴This case is cited in the CISG Digest, 2016 Edition, available at www.uncitral.org/.

Applying Article 8 CISG, the court found that the buyer's purchase orders did not incorporate the seller's standard conditions: citing an Austrian Supreme Court decision, the court explained that "standard terms, in order to be applicable to a contract, must be included in the proposal of the party relying on them as intended to govern the contract in a way that the other party under the given circumstances knew or could not have been reasonably unaware of this intent." [*Tantalum Powder Case*, 17 December 2003, CLOUT case No. 534.] The court found that the buyer did not intend seller's standard conditions to be incorporated into its purchase order/offers as those purchase orders included provision that were different from the seller's standard terms. The court then found that the seller's reference to its standard conditions in its order confirmations did not suffice to incorporate those terms into the order confirmations. The court found that the language included on the order confirmations was "ambiguous at best," as the language merely directed the buyer to a website that needed to be navigated in order for the standard conditions to be located. Furthermore, the court found no evidence that the buyer had actual knowledge of the attempted inclusion of the standard conditions, nor evidence that the parties discussed incorporation of the standard conditions during contract negotiations. Finally, no employees of the seller initialed the statement attempting to incorporate the standard conditions. Because neither the purchase orders nor the order confirmations incorporated by reference the standard conditions, the court held, the standard conditions were not part of the contracts.

Although the seller's standard conditions shown on its web site were not a part of the parties' agreement, the court nevertheless found that the language in the seller's documents that expressly required credit insurance coverage for the buyer's payments was properly incorporated into the contract. The court explained that this "language did not reference any other document but rather was an independent additional term under Article 19 of the CISG." This language, furthermore, was material under Article 19(3) CISG because it related to payment terms for goods. Because this material additional term was properly incorporated into the seller's order confirmations, the order confirmations constituted counteroffers rather than acceptances.

The court next decided whether the buyer accepted the seller's counter-offers, including the seller's language permitting the seller to demand advance payment or guarantees in the absence of credit insurance for the buyer's payment. Applying Article 18(1) CISG, the court found that the buyer accepted the first of the seller's offers when it emailed the seller stating that it had reviewed the order confirmations and that the seller could "proceed with the manufacture of the plates." The court found that the buyer accepted the seller's second offer when it provided drawings as instructed by the seller and confirmed compliance with the instructions via email — making no statement that it was not accepting the additional terms.

Throughout its discussion of the CISG, the court recognized that "[w]hen [American Courts] interpret treaties, [they] consider the interpretations of the courts of other nations" (quoting a concurring opinion in a United States Supreme Court decision). The court also cited a variety of German decisions, including the decision of the German Supreme Court VIII ZR 60/01, 31 October 2001 (see CLOUT case No. 445); it recognized that "it is appropriate to consider commentaries when interpreting treaties" and it cited a variety of commentaries on the CISG.

Having determined that, under the CISG, the buyer accepted the seller's counter-offers that required payment guarantees or advance payment should the seller's credit insurer deny coverage of the buyer's payment, the court held that the buyer repudiated the contract when it refused performance following the seller's demand for such guarantees or advance payment. Applying Article 71 CISG, the court found that there was no dispute that the buyer refused to perform on the contract, as the buyer sent the seller a letter stating that it would procure the goods from an alternate supplier. The court concluded that "[i]t is hard to imagine a clearer repudiation," and it held that the buyer had breached its contractual obligations.